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No. 92-694

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

CHARLES LEWIS MCGRANAGHAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a state statute which tolls the criminal statute of limitations for up to three years when a defendant leaves the jurisdiction for any reason including employment violate federal constitutional protection for interstate commerce?

2. Does such a statute violate the federal constitution by denying equal protection and/or the privileges and immunities guaranteed to citizens of the United States?

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OPINIONS BELOW

On May 28, 1992, the California Court of Appeal, Third Appellate District, filed its unpublished opinion which denied petitioner's appeal of the conviction

challenged in this petition. The California Supreme Court denied petitioner's petition for review on August 12, 1992. Both of those orders have been included in petitioner's brief to this court as Appendices "A" and "B".

JURISDICTION

Petitioner invokes jurisdiction of this Court under 28 U.S.C. § 1257, subdivision (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that the commerce clause contained in Article I, section 8, clause 3, of the United States Constitution, and the privileges and immunities clause of the Fourteenth Amendment to the Constitution are involved in this case.

Petitioner asserts that certain limitations and tolling

provisions of the California Penal Code are in violation of the federal constitutional provisions cited above.

The provisions relevant to petitioner's claim are sections 799, 800, 801 and portions of sections 803 and 804. The text of these sections is cited in Appendix "A" of respondent's brief due to length.

STATEMENT OF THE CASE

On May 8, 1990,[1/] the

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1. Pursuant to California Penal Code section 804, subdivision (d), the action was commenced for purposes of the statute of limitations on August 23, 1989, with the filing of an arrest warrant naming petitioner. Petitioner has incorrectly stated that the action commenced with the filing of a complaint in municipal court. (See Pet., p. 5, fn. 1; see also opinion by California Court of Appeal, fn. 6, appearing herein in Pet., p. 26.)

Petitioner has also inaccurately transcribed a date in the opinion appearing on line five of page 26 of the petition. The correct date should be August 23, 1983.

District Attorney of Sacramento County filed information number 96368 in Superior Court against Charles L. McGranaghan, petitioner herein, alleging 14 violations of the California Corporations and Penal Codes. On January 25, 1991, the jury found appellant guilty as charged on four counts of making a false statement in an offer to sell a security (Corp. Code, § 25401); three counts of grand theft (Pen. Code, § 487.1), and one count of fraudulent sale of a security (Corp. Code, § 25441). (CT 536.)

Appellant was placed on five years probation, the terms and conditions to include service of 180 days in the county jail and restitution in the amount of $126,812.11. (CT 608-614.)

The decision by the California Court of Appeal, Third District, denying appellant's appeal was filed on May 28, 1992. The California Supreme Court denied petitioner's petition for review on August 12, 1992.

STATEMENT OF FACTS

Respondent would respectfully refer this Court to the statement of facts contained in the opinion by the California Court of Appeal which appears on pages 20-23 of the petition. In summary, petitioner promised to invest the victims' funds in a certain manner, but instead converted them to his own purposes and lost them.

Some further discussion of the posture of appellant's argument and the nature of the California statutes under challenge is helpful, however.

California's limitations statutes, formerly a welter of scattered and uncoordinated provisions, were overhauled in 1984 into a coordinated and consistent scheme. (Cal. Stats. 1984, c. 1270; see Appendix "A".)

In summary, the new statutes provide for unlimited prosecution of crimes punishable by death or life in prison or for embezzlement of public funds, a limitation of six years from the time of the offense for other specified major felonies, and a limitation of three years from the time of the offense for most other felonies.

The limitation for certain specified felonies, including those committed by appellant, does not commence until the discovery of the offense. Further, if a defendant is

"out of the state when or after the offense is committed," the limitation will be tolled for up to a maximum of three years.

Prosecution of petitioner began on August 23, 1989; by stipulation he was working outside of California between 1985 and the commencement of prosecution. Thus discovery of the offense must have occurred sometime after August 23, 1983, to avoid a loss of jurisdiction based on the statute of limitations. Substantial evidence showed that discovery did not occur, and could not reasonably have occurred, until well after that date.

The prosecution thus relied on both the three year statute of limitations and the three year out-of-state tolling provision to bring the

offense within the trial court's jurisdiction.

SUMMARY OF ARGUMENT

Petitioner's challenge to the tolling provision of California's statute of limitations for criminal offenses on commerce clause grounds is not worthy of certiorari review because there is no conflict among lower courts on the issue, the issue is not ripe, and it is plainly nonmeritorious.

The applicability of *Bendix v. Midwesco Enterprises*, 486 U.S. 888 (1988), the case on which appellant relies, to criminal tolling provisions appears to have been addressed in only one published decision, and that adversely to petitioner. Moreover, the analysis in *Bendix* does not suggest any basis for applying it to criminal tolling provisions.

This Court's decision in *Jones v. Helms*, 452 U.S. 412 (1981), which upheld a statute penalizing criminal offenders for leaving the state against a challenge based on the constitutional right to travel, is dispositive of the issue raised by petitioner.

ARGUMENT

CERTIORARI IS INAPPROPRIATE IN THE PRESENT CASE BECAUSE THE CONSTITUTIONALITY OF STATUTES TOLLING CRIMINAL STATUTES OF LIMITATIONS IS WELL ESTABLISHED

Petitioner relies on this Court's opinion in *Bendix v. Midwesco Enterprises*, 486 U.S. 888 (1988), as authority for his assertion that a tolling provision of a *criminal* statute of limitations based on absence from the jurisdiction violates the commerce clause because a criminal suspect contemplating removal from the state would be somehow chilled from seeking employment outside the jurisdiction.

Bendix is a fact-based decision striking down a provision of Ohio's civil statute of limitations, and as such has no relevance to criminal tolling provisions. Nor has any court so held; respondent is aware

of only one published case, from the state of Wisconsin,[2/] in which the applicability of *Bendix* to a criminal tolling provision is even addressed. Thus under the traditional criteria by which this Court determines whether to grant certiorari -- ripeness, conflict among the federal circuits or state courts, and public importance -- certiorari is not even a remote consideration.

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2. The case is *State v. Sher* (Wisc. 1990) 437 N.W.2d 878, 149 Wis. 2d 1. (Petitioner (p. 11) has mistakenly placed this case in the North Eastern Reporter series.) The court held first that the statute of limitations is not a fundamental right, and thus that its denial can infringe on no fundamental rights, and that even if there were a fundamental right involved its denial was substantially related to legitimate state interests. The interests were identified as "identifying criminals, detecting crime, and apprehending alleged criminals, when nonresidents may be involved or have vital information." (437 N.W.22d at pp. 881-883.)

Further, petitioner's claim is plainly nonmeritorious. Indeed, this Court has recently addressed a closely related issue in a manner which would also dispose of appellant's commerce clause claim. The case is *Jones v. Helms*, *supra*, 452 U.S. 412. In *Jones*, the Court had occasion to quote with approval the case petitioner now attacks, *Scherling v. Superior Court*, 22 Cal.3d 493 (1978). (See Pet., p. 11.) In *Scherling*, the California Supreme Court addressed a constitutional challenge to a former criminal statute providing for unlimited tolling during absence from the jurisdiction. The challenge was based in part on the right to travel, and relied on this Court's decision in *United States v. Guest*, 383 U.S. 745 (1966) and other cases. (*Scherling v.*

Superior Court, *supra*, 22 Cal.3d at p. 501.)

The California court concluded:

> "While these cases [*Guest* and others] instruct us on broad principles, there is clearly a distinction between one who, like defendant, leaves the state after committing a crime, resulting in the tolling of the statute of limitations during his absence, and one who has committed no crime but is deprived of a government benefit merely because he exercises his right to travel to another state. In the former circumstance, the state has

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> an interest in assuring that the defendant is available locally not only to enhance the possibility of detection but also to avoid the burdens of extradition proceedings, should he be charged, his whereabouts become known, and he refuses to return voluntarily." (*Scherling v. Superior Court*, *supra*, *loc. cit.*)

This Court subsequently quoted that language with approval in *Jones v. Helms*, *supra*, 452 U.S. 412, 421, fn. 18. In *Jones*, the statute at issue was a Georgia statute raising the offense of child abandonment from a misdemeanor to a felony if the resident offender should leave the state, and the challenge was based on equal

protection and the right to travel. This Court rejected the right to travel claim, distinguishing it from previous travel cases. The Court stated:

> "In all of these cases, the statute at issue imposed a burden on the exercise of the right to travel by citizens whose right to travel had not been qualified in any way. In contrast, in this case, appellee's criminal conduct within the state of Georgia necessarily qualified his right thereafter freely to travel interstate. Appellee's claim is therefore on a different footing from the claims at issue in [the previously cited cases].

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[Footnote.] " (*Jones v. Helms, supra*, 452 U.S. at pp. 420-421.)

The Court then appended footnote 18 citing with approval *Scherling v. Superior Court, supra*, in the language quoted above, as well as a decision by the Georgia Supreme Court upholding its tolling statute. That language also bears repeating:

> "There is an entirely obvious difference, on the one hand, between an attempt by a 'receiving state' to preclude or discourage inward migration from 'sending states' of persons deemed by the 'receiving state' to be 'undesirables,' 'non-contributors' or 'economically burdensome

persons,' and efforts, as in the present case, by a 'sending state' to bring persons accused of crimes back from 'receiving states' to face criminal trial and punishment in the 'sending state.' Persons, including indigents and other migrants, have a right of free travel. . . . On the other hand, persons charged with the commission of crimes shall be delivered up to the state having jurisdiction of the crime. . . . A person charged in Georgia with commission of a crime who has left Georgia and entered another state cannot be said to have a constitutionally protected

right of free travel in interstate commerce that can be asserted to bar prosecution for the Georgia offense." (*Garren v. State*, 245 Ga 323, 325-325, 264 SE2d 876, 877-878 (1980) (citations omitted).)

Respondent submits that the conclusions by the three courts cited above are equally applicable to both the constitutional right to seek employment outside the state and the right to travel. Indeed, one cannot have the right to seek employment outside the state without a right to travel, and if the right to travel may be curtailed, the right to interstate employment is necessarily curtailed as well.

An examination of *Bendix v.*

Midwesco Enterprises, supra, does not suggest otherwise. The case addresses an Ohio statute which tolls indefinitely a four-year statute of limitations in actions for breach of contract or fraud whenever a person or corporation is not "present" in the state. To be present under the statute, a foreign corporation was required to appoint an agent for service of process, which operated as consent to general jurisdiction. Noting that Midwesco Enterprises was at all times reachable through the long arm statute, this Court concluded that the tolling provision placed a greater burden on out-of-state companies than on Ohio companies and constituted an unreasonable burden on commerce. (*Id.*, 486 U.S. at pp. 894-895.)

This reasoning simply does

not give rise to a parallel analysis of criminal tolling provisions for the reasons set forth both by the California Supreme Court in *Scherling* -- the state's interest in detection and avoidance of extradition - and this Court in *Jones* -- that a defendant's criminal conduct within the state places him or her on a different footing than other residents of the state.

Appellant's request for certiorari must accordingly be rejected.[3/]

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3. Petitioner has attempted to interject extraneous issues into his frontal attack on the tolling statute. For example, he cites cases addressing tolling statutes of much greater length than California's three year limitation. (Pet., p. 11.) He cites the "perniciousness" of a tolling statute which could be applied to interstate commuting, a situation not present here. (Pet., p. 1, fn. 2.) He complains of actual prejudice from the purported delay in his prosecution

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted.

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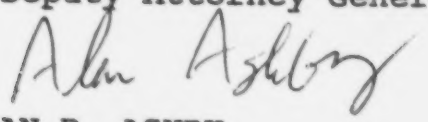

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(Pet., p. 12-13), yet failed to avail himself in the trial court of the remedy available to him for actual prejudice under state and federal decisions. (*U.S. v. Marion*, 404 U.S. 307 (1971); *People v. Archerd*, 3 Cal.3d 615 (1970); *Rice v. Superior Court*, 49 Cal.App.3d 200 (1975). These discussions are simply red herrings.

APPENDIX A

APPENDIX "A"

California Penal Code section 799 provides as follows:

> "Prosecution for an offense punishable by death or by imprisonment in the state prison for life or for life without possibility of parole, or for the embezzlement of public money, may be commenced at any time."

California Penal Code section 800 provides as follows:

> "Except as provided in Section 799, prosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after commission of the offense."

California Penal Code section 801 provides as follows:

> "Except as provided in Sections 799 and 800, prosecution for an offense punishable by imprisonment in the state prison shall be commenced within three years after commission of the offense."

California Penal Code section 803 provides in relevant part:

. . . . . .

> "(c) A limitation of time prescribed in this chapter does not commence to run until discovery of an offense described in this subdivision. This subdivision applies to an offense punishable by

imprisonment in the state prison, a material element of which is fraud . . . including, but not limited to, the following offenses:

"(1) Grand theft of any type, . . .

. . . . . .

"(3) A violation of Section . . . 25541 of the Corporations Code."

. . . . . .

"(d) If the defendant is out of the state when or after the offense is committed, the prosecution may be commenced as provided in Section 804 within the limitations of time prescribed by this chapter,

and no time up to a maximum of three years during which the defendant is not within the state shall be a part of those limitations."

California Penal Code section 804 provides as follows:

"For the purpose of this chapter, prosecution for an offense is commenced when any of the following occurs:

"(a) An indictment or information is filed.

"(b) A complaint is filed with an inferior court charging a public offense of which the inferior court has original trial jurisdiction.

"(c) A case is certified to the superior court.

"(d) An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint."